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Placentophagy: A Women's Right to Her Placenta

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PLACENTOPHAGY: A WOMAN’S RIGHT TO HER PLACENTA

Amber Goeden*

Placentophagy is the consumption of the placenta after childbirth. While not every woman participates in placentophagy, there has been a notable increase of the practice. Many reasons exist in why woman partake in placentophagy. The most notable reasons for the growth, is the claimed increased breast milk production and the potential for reducing the effects of post-partum depression. Even though a woman might choose to partake in placentophagy, she might be met with law, or the lack thereof, that restricts her access to her placenta.

Due to the increased requests for the placenta it has highlighted that a woman’s right to her placenta is undefined, except in three states. This Article examines the history of placentophagy, benefits of the practice, existing property rights regarding excised tissue and the regulations surrounding these rights, ultimately ending with a solution to the issue: limited property rights should be awarded to women who would like to take possession of their placentas after childbirth.

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INTRODUCTION

Placentophagy, the consumption of one’s own placenta,¹ has recently seen increased recognition from celebrities and advocates due to claims of reduced postpartum depression and increased breast milk production.² This once taboo practice is making a comeback in modern society. The main obstacle for the pregnant woman who wishes to take this homeopathic approach is, surprisingly, the law.

For example, Jordan Theiring, a Mississippi woman, wanted to partake in placentophagy after the birth of her child, but the Mississippi Department of Health and Welfare told her that she was a “third party” to her placenta and would need a court order to take it home.³ This is not an isolated circumstance; in fact, many women interested in engaging in placentophagy find themselves similarly situated.⁴ Women are being told by their physicians or hospitals that it is simply not an option or are met with court order

¹ The consumption of the placenta can be achieved in a multitude of ways. Cynthia W. Coyle et al., *Placentophagy: Therapeutic Miracle or Myth?*, 18 ARCH WOMENS MENTAL HEALTH 673, 674 (2015). The main source of consumption at this time is through the encapsulation process. *Id.* The process entails preparing the placenta through dehydration—sterilized or not—and then grinding it to fill dissolvable capsules. *Id.* Encapsulation can be performed by the woman, a service that comes to the home, or an entity that performs it off site. *Id.* Other forms of preparation include eating it raw right after birth, adding it to a smoothie type drink, or preparing it in a stir-fry meal. James Spratt, *Cooking Up Placenta*, YOUTUBE (Oct. 27, 2007), www.youtube.com/watch?v=6ceBxQSRLrg. The taste is compared to the iron taste of liver. *Id.*

² Coyle et al., *supra* note 1, at 673.

³ WTLV Staff, *Pregnant Mississippi Woman Wins Right to Her Placenta*, FIRSTCOASTNEWS (June 1, 2016), http://www.firstcoastnews.com/article/news/pregnant-mississippi-woman-wins-right-to-her-placenta/225974656?fb_comment_id=1139871049406911_1139917136068969?fb_comment_id=1139871049406911_1139917136068969.

⁴ Jodi Selander, *Getting Your Placenta Released From the Hospital and Your Rights*, WOMBART, <http://www.wombmart.com/hospital-placenta-release> (last visited Feb. 17, 2018).

requirements. Sometimes the physician disregards hospital policy and may release a woman's placenta to her. Other women go so far as to take their own placentas without the knowledge of the physicians or hospitals.⁵

Most women would be stunned to discover that the law does not consider a piece of their body to be their property, and they legally have almost no voice regarding the use of their own placentas. The increasing number of women requesting their own placentas to engage in placentophagy is illuminating this important legal issue.⁶

Establishing property rights in the placenta would allow unburdened access for the woman. However, it is important to recognize that full property rights in the placenta do have the potential for harmful societal consequences. To minimize those consequences, a carve out in federal regulations,⁷ further enactment of state statutes,⁸ or hospital policies must also be considered to minimally restrain those property rights while still allowing access to the placenta.

Part I will discuss a short history of placentophagy, other cultural practices associated with the placenta, and the potential health benefits of placentophagy. In *Part II*, this Article will analyze the implications of existing property laws on tissue, cells, and blood. *Part III* will examine existing regulations of federal and state statutes that affect the handling and use of the placenta. Finally, *Part IV* will develop a solution to allow women the right to access their placentas by granting property rights and suggesting a carve out to the already existing regulations.

I. HISTORY AND HEALTH BENEFITS OF PLACENTOPHAGY

While the history of placentophagy is not well documented, it is believed to be a centuries-old practice embraced by many cultures.⁹ This

⁵ Carrie Feibel, *Texas Defends A Woman's Right To Take Her Placenta Home*, NPR (June 28, 2015 2:25 PM), <http://www.npr.org/sections/health-shots/2015/06/28/414836758/texas-defends-a-womans-right-to-take-her-placenta-home>.

⁶ Rebecca N. Baergen et al., *Placental Release or Disposal? Experiences of Perinatal Pathologists*, PEDIATRIC & DEV. PATHOLOGY 327, 329 (2013).

⁷ A carve out, versus a new regulation, would allow for a more efficient way to promote the exception. By being located within the original regulation, its accessibility might promote a higher compliance rate due to affected hospital employers knowing of the existing regulation.

⁸ At time of publication, Hawaii, Oregon, and Texas have clear, pro-placentophagy statutes allowing women to take custody of their placentas.

⁹ See William B. Ober, *Notes on Placentophagy*, 55 BULL. N.Y. ACAD. MED. 591, 594 (1979).

section will explore the history of placentophagy and consider some of the reputed health benefits.

A. *History of Placentophagy*

A handful of professionals have documented their knowledge and ideas about placentophagy. In a 1902 issue of the *British Medical Journal*, the author ponders the question of human placentophagy.¹⁰ He asserts that tribes with “no manners and whose customs are objectionable” are the ones who predominately practice it, specifically pointing to a recording in 1719 where a “Yakouts”¹¹ father and son ceremonially ate the placenta.¹² Providing further evidence of placentophagy, he considers a report from an Algerian physician in January of 1902.¹³ The physician states that placentophagy is practiced in parts of Sudan, but the “peasantry of Morocco and Algiers know nothing of it.”¹⁴ Reports like these provide evidence that placentophagy was practiced within many cultures, but its advertisement was kept minimal. Another medical journal reports multiple possible instances of placentophagy, but the article relies on minimal concrete documentation, and instead reports on a physician’s experience and the author’s interpretation of text.¹⁵

William Ober, M.D., reporting in the *Bulletin of New York Academy of Medicine*, became inquisitive about the history of placentophagy and sought to further investigate.¹⁶ His inquisition began after learning of the existence of placentophagy through a letter from a physician, which described an interaction with a Czechoslovakian nurse–midwife at a Vietnam hospital.¹⁷ The Czechoslovakian nurse–midwife informed the physician of the practice of placentophagy by the other nurse–midwives from the Chinese and Thai mountain tribes.¹⁸ The Czechoslovakian midwife explained that the

¹⁰ *Placentophagy and Placental Opothrapy*, 1 BRITISH MED. J. 909 (1902).

¹¹ The author states “Yakouts” but is most likely referring to the California Native American Tribe Yakot, as information on “Yakouts” was unobtainable.

¹² *Placentophagy and Placental Opothrapy*, *supra* note 10.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Ober, *supra* note 9, at 591.

¹⁶ *Id.* at 591–92.

¹⁷ *Id.* at 591. At the beginning of the article the author refers to a “proposer,” but when the citation is referenced it is Ober himself to which he is referring. *Id.*

¹⁸ *Id.* at 591–92.

Chinese and Thai nurse-midwife ritual consisted of eating the placenta, not from any mother, but only from their healthy, young, and beautiful patients.¹⁹ Then the Czechoslovakian midwife proceeded to show the physician remnants of browned placenta in a frying pan.²⁰ When the physician tried to obtain further information from the Vietnamese doctors, the doctors were reluctant to discuss the practice, as they were already aware of the apprehension the Czechoslovakian felt about the practice.²¹ The doctors even tried hiding the placentas and discouraging the tribal midwives from consuming them.²²

Ober also suggests that, in Deuteronomy, Chapter 28, the Bible encourages placentophagy: "If we accept the idea that Biblical imagery and metaphor reflect the culture of the time and place, it is reasonable to infer that the passage refers to a remote tribal memory, now suppressed, of a period when placentas were eaten, at least in times of famine."²³ Many years later,

¹⁹ *Id.* at 591.

²⁰ *Id.*

²¹ *Id.* at 592.

²² *Id.*

²³ *Id.* Ober's conclusion comes from the Bible's translated text, which reads as follows:

The tender and delicate woman among you, which would not adventure to set the sole of her foot upon the ground... her eye shall be evil toward the husband of her bosom, and toward her daughter. And toward her young one that cometh out from between her feet, and toward her children which she shall bear; for she shall eat them for want of all things secretly in the siege and straitness....

Id. at 595. Ober states that the translators of the Bible's text relied on the "*Targum of Aquila* as their authority." *Id.* He continues on by employing the different Biblical languages to further translate meanings to prove the translation is correct. *Id.*

In the Greek text the phrase 'that cometh out from between her feet' is written as *chorion*, and in the Vulgate it appears as *secundinae partes*, clearly the placenta. In Aramaic codices the phrase is *u:ve-shilyatah*, from the root *shilya* which means placenta, cf. *uvishphir shilyeta* (placenta and membranes) in the *Targum of Jerusalem*, which is translated as 'that which issues forth from the place of shame at the time of birth.' (For 'the place of shame,' cf. *pudenda*.) The 1917 translation of the Jewish Publication Society of America, based on the Masoretic text, correctly uses the word 'afterbirth.'

Id.

Sharon M. Young and Daniel C. Benyshek became curious about the practice of placentophagy and tried to gain insight through a cross-cultural survey.²⁴

Researchers surveyed 179 societies in a cross-cultural study that resulted in only three separate reports of placentophagy: maternal, paternal, and infant placentophagy.²⁵ The only identified culture that practiced maternal placentophagy was the Mexican-American culture.²⁶ Unfortunately, the study could not prove whether it was an engrained cultural practice.²⁷ Two other cultures were noted to practice placentophagy. The Malekula of Melanesia practiced paternal placentophagy by having the new father eat a pudding made from the placenta and blood.²⁸ The Gullah practiced infant placentophagy if the placenta covered the baby's face at birth.²⁹ They would take the placenta and make a tea, which then would be given to the baby.³⁰

The same cross-cultural study identified instances where the placenta was valued and used for purposes other than eating.³¹ The most common cross-cultural uses of the placenta pertain to disposal.³² Fifty-five percent of cultures reported burying the placenta, sometimes in specified locations important to the birth or family and other times in unspecified locations.³³ Other cultures varied the disposal based on their cultural beliefs about the placenta and what it represents.³⁴ Most cultures that purposely dispose of the placenta believe that the treatment of the placenta can "alter or predict the future."³⁵

²⁴ See generally Sharon M. Young & Daniel C. Benyshek, *In Search of Human Placentophagy: A Cross-Cultural Survey of Human Placenta Consumption, Disposal Practices, and Cultural Beliefs*, ECOLOGY FOOD & NUTRITION 467 (2010).

²⁵ *Id.*

²⁶ *Id.* at 472.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Gullah is a culture comprised of direct decedents of the West African slaves of the 1700s that were forced to work in the Carolinas and Georgia rice patties, cotton, and indigo fields. Adeline Chen & Teo Kermeliotis, *African Slave Traditions Live on in U.S.*, CNN (Dec. 10, 2012 12:46 PM), <http://www.cnn.com/2012/12/07/world/africa/gullah-geechee-africa-slavery-america/>.

³⁰ Young & Benyshek, *supra* note 24, at 472.

³¹ *Id.* at 473.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

The second most common ideology related to the placenta is the implication of human qualities or a close connection to the child through a “name or description of the placenta.”³⁶ Some of the names for the placenta in different cultures include sibling, mother, grandmother, parent, blanket, house, or skin; the placenta is also often associated with the child’s spirit double.³⁷ In light of the strong cultural presence regarding the disposal of the placenta, researchers are perplexed as to why there is not more of a presence regarding the practice of maternal placentophagy.³⁸

Some researchers speculate that societies’ or outsider’s perception of engaging in placentophagy might be the reason cultures are apprehensive to reveal the practice.³⁹ Many may have viewed it as taboo because of its close relation to cannibalism,⁴⁰ although researchers find this peculiar, since there is evidence of cultures practicing cannibalism.⁴¹ Another theory is that obstetrician practices were considered a natural event and were therefore not recorded by historians or, if recorded, were superficial and inaccurate.⁴² In addition, due to patriarchy-dominated society and out of superstition, the birthing process often involved only women.⁴³ Although there is limited recorded historical presence of placentophagy, it has been connected with providing health benefits.⁴⁴

³⁶ *Id.*

³⁷ *Id.* at 479–80.

³⁸ *Id.* at 481.

³⁹ See Ober, *supra* note 9.

⁴⁰ Even with a negative cultural view of cannibalism, it is not illegal to partake in cannibalism, which is also known as anthropophagy. Carmen M. Cusack, *Placentophagy and Embrophagy: An Analysis of Social Deviance within Gender, Families or the Home (Etude 1)*, 1 LSD J. 112, 115 (2011). Idaho is the only state that bans anthropophagy (consumption of human tissue or blood). *Id.* at 117–18. Cusack argues that the Idaho statute would be unconstitutionally broad and inapplicable to adults through a *Lawrence v. Texas* analysis. *Id.* at 124–29. She reasons that prosecuting the performance of a sexual act, i.e. “cunnilingus, involving the consumption of healthy menses,” would violate privacy rights, since there is no legitimate state interest in regulating the act. *Id.* at 127.

⁴¹ Gwendolyn E. Cremers & Kathryn Graff Low, *Attitudes Toward Placentophagy: A Brief Report*, HEALTH CARE FOR WOMEN INT’L 113, 118 (2014).

⁴² Ober, *supra* note 9, at 592.

⁴³ *Id.*

⁴⁴ See generally *Placentophagy & Placenta Ophtherapy*, *supra* note 10; Jodi Selander et al., *Human Maternal Placentophagy: A Survey of Self-Reported Motivations and Experiences Associated with Placenta Consumption*, ECOLOGY FOOD & NUTRITION 93, 104 (2013).

B. *Health Benefits of Placentophagy*

The two health benefits of placentophagy that are reported most often are reduced postpartum depression and increased breast milk production.⁴⁵ Unfortunately, even with these self-reported health benefits, there is a lack of empirical evidence to support these claims.⁴⁶ Researchers are skeptical about unsupported claims that are tantamount to nothing more than anecdotal tales. Their skepticism stems from a number of factors, including the lack of control groups, stringent standards regarding the dosage of the placenta and timing of consumption, review of milk production, and signs of postpartum depression.⁴⁷

In the absence of empirical results, however, self-reported benefits should not be dismissed. Research based on a self-reporting survey indicates that, of 189 women who partook in placentophagy, 40% experienced enhanced mood and 15% experienced improved milk production.⁴⁸ The remaining 45% experienced other positive side effects, such as increased energy, reduced postpartum bleeding, and other positive bodily functions.⁴⁹ Ninety-eight percent of the 189 women indicated they would engage in placentophagy again.⁵⁰ To appreciate the health benefits of placentophagy, it is helpful to understand the composition and purpose of the placenta.

The placenta is a barrier that keeps the baby separate from the woman's own biological system and acts similar to the kidney.⁵¹ It filters the blood and fluids before delivering them to the baby through membranous transport.⁵² The filtering process enriches the placenta with vitamins, minerals, and hormones.⁵³ Advocates state that consumption of the placenta

⁴⁵ Marisa E. Marraccini & Kathleen S. Gorman, *Exploring Placentophagy in Humans: Problems and Recommendations*, 60 J. MIDWIFERY WOMEN'S HEALTH 371, 375 (2015).

⁴⁶ Cremers & Low, *supra* note 41, at 115.

⁴⁷ Coyle et al., *supra* note 1, at 675–76 (demonstrating that the main category comparisons are between placentophagy and effects on postpartum depression and milk production).

⁴⁸ *Id.* (Enhanced mood is referring to “*improved mood* (i.e., alleviated symptoms of the baby blues or a mood disorder, or otherwise alleviated mood)”).

⁴⁹ *Id.* at 104.

⁵⁰ *Id.* at 105.

⁵¹ Michael Rindler, *Fertilization and Placenta*, http://education.med.nyu.edu/courses/macrostructure/lectures/lec_images/placenta.htm (last visited Feb. 17, 2018).

⁵² Nova Science Publishers, Inc., *THE PLACENTA: DEVELOPMENT, FUNCTION AND DISEASES* 11 (2013).

⁵³ Sharon Schwartz, *Maternal Placentophagy as an Alternative Medicinal Practice in the Postpartum Period*, MIDWIFERY TODAY 28, 28 (2014).

replenishes the woman's depleted vitamin and hormone levels, which are drastically and quickly depleted following the birth of the placenta and child.⁵⁴ The lack of hormones, coupled with the stressful situation that is childbirth, can exacerbate the onset of postpartum depression.⁵⁵ By partaking in placentophagy, the woman can swiftly replenish her vitamins and hormone levels.⁵⁶

Consumption of the placenta also affects breast milk supply.⁵⁷ Researchers theorize that, when the placenta is consumed, the "placental lactogen, similar in structure to prolactin, binds to prolactin receptor sites stimulating mammary cells and thus increasing milk production."⁵⁸ A study conducted in 1954 saw an increase in milk production through the consumption of the placenta.⁵⁹ During the study, a beef-placebo was given to some new mothers, while others received actual placenta.⁶⁰ The placenta-fed mothers showed a milk increase of 86.2%, while the beef-fed mothers showed a 33% increase of milk production.⁶¹ This research is criticized because the standards surrounding human subjects⁶² had not been implemented when the study was conducted.⁶³

Another study in 1902 was conducted to determine if there was an increase in breast milk production through placentophagy.⁶⁴ While it did not hypothesize the same placental-lactogen-binding theory as above, it provides another supportive example of placentophagy's benefits. The 1902 *British Medical Journal* reported an increase in breast milk production, but this time sheep placenta was used in the test.⁶⁵ The placental juices were used to make

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² When conducting research using human subjects, researches are required to abide by very stringent standards promulgated by Health and Human Services, which oversees research conducted by hospitals. *Institutional Review Boards Frequently Asked Questions - Information Sheet*, U.S. FOOD & DRUG ADMIN. <https://www.fda.gov/RegulatoryInformation/Guidances/ucm126420.htm> (last visited Feb. 17, 2018).

⁶³ Schwartz, *supra* note 53.

⁶⁴ *Placentophagy & Placental Opothrapy*, *supra* note 10, at 909.

⁶⁵ *Id.*

syrup, which was given to patients in a birthing ward.⁶⁶ Most patients saw an increase in milk production.⁶⁷ The syrup was also given to two patients who were experiencing painful menstruation cycles but were not postpartum.⁶⁸ One woman reportedly obtained relief from her cycle, while both (one had one child and the other had no children) apparently secreted milk as well.⁶⁹

Researchers would likely also criticize this study. Regardless, it supports the hypothesis that there is a relationship between consuming placenta and milk production. The lack of empirical evidence established through modern research practices, while noteworthy, should not discount the existing evidence of placentophageal benefits. A woman's reason for engaging in placentophagy is personal and property rights should not be determined by the lack of empirical evidence, especially if the right is not harmful to the woman or her baby. Likewise, many naturopathy practices do not have definitive results about their benefits, yet many people use the practices and report benefits.⁷⁰

Placentophagy has been practiced for hundreds of years by a variety of cultures. The purposes and benefits may not have been clear in the past, but they are more so now. Women engage in placentophagy to help reduce postpartum symptoms and increase milk production. Even with minimal empirical evidence and the understanding that additional research for definitive answers may still be required, property law should still adapt to allow the woman greater placental control.⁷¹ Additionally, outside of placentophagy, many cultures have used and still use the placenta for other cultural purposes. There is enough history and support to determine that the placenta has significant value, which is why women seek to control it after birth. Recognizing this value makes granting ownership rights in the placenta a logical step.

⁶⁶ *Id.* (stating "M. Bouchacourt reports M. Brindeau's experience and a series of cases in Professor Tarnier's wards," which presumably this ward would be like a modern labor and delivery floor in a hospital.).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Other naturopathic treatments include acupuncture for fertility, cupping for muscle performance, acupuncture for cancer treatments, etc.

⁷¹ Coyle et al., *supra* note 1, at 678.

II. PROPERTY LAW

Despite the historical significance of placentophagy and its claimed health benefits, it is difficult for women to access their own placenta after childbirth. This raises a legal issue. What rights, if any, does a woman have in her placenta after it has been delivered? This question is answered in the following section.

A. *Background of Property Rights*

While a general rule of “its mine, not yours” seems appropriate under property law, it is not that simple.⁷² A property right is not spontaneously created when a person decides to control an object. For property rights in an object to be granted, a justification for the right to control must first be determined.⁷³ Property rights are not inherent but are rather created through human invention based upon reason and are justified by applying a number of theories: first occupation/possession, labor/desert, utilitarianism, civil republican, and personhood.⁷⁴

First occupation is the most basic principle of property law: the “first person to possess an object is its owner.”⁷⁵ The labor/desert principle provides that, through “a person’s work,” a person creates a private property right.⁷⁶ For example, if a person cultivates a field through plowing, planting seeds, picking weeds, and harvesting a crop, a property interest would vest in the crops yielded. Utilitarianism, based on Jeremy Bentham’s theory, is the promotion of the welfare of the citizens.⁷⁷ Promoting welfare allocates rights to “maximize human satisfaction or benefit.”⁷⁸ For this principle, allowing people certain benefits that make them happy in turn benefits society as a whole.⁷⁹ Civil republican theory promotes “economic security necessary to

⁷² Vincent Chiappetta, *The (Practical) Meaning of Property*, 46 WILLAMETTE L. REV. 297, 313 (2009).

⁷³ JOHN G. SPRANKLING & RAYMOND G. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 2 (3rd ed. 2015).

⁷⁴ SPRANKLING & COLETTA, *supra* note 74, at 2–8.

⁷⁵ Ori Friedman & Karen R. Neary, *First Possession Beyond the Law: Adults’ and Young Children’s Intuition about Ownership*, 83 TUL. L. REV. 679, 680 (2009).

⁷⁶ Stephen Munzer, *The Special Case of Property Rights in Umbilical Cord Blood for Transplantation*, 51 RUTGERS L. REV. 493, 498 (1999).

⁷⁷ SPRANKLING & COLETTA, *supra* note 74, at 4.

⁷⁸ Vera Bergelson, *It’s Personal but is it Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379, 498 (2003).

⁷⁹ SPRANKLING & COLETTA, *supra* note 74, at 4–5.

make political decisions to serve the common good.”⁸⁰ This principle stems from England, when the people who held land were the ones with the most political clout.⁸¹ Finally, the personhood principle is the acknowledgment that certain property promotes a person’s individual development.⁸² To achieve proper self-development, a person “needs some control over resources in the external environment.”⁸³ These principles affect the justification of property rights. Property rights are created in an object based on these justifications. The next question is what these “rights” look like and how they are controlled.

Property rights are characterized as a “bundle of sticks.”⁸⁴ Each “stick” is correlated to an individual property right.⁸⁵ The rights to use or possess, exclude, transfer, enjoy the fruits or profits, or destroy an object are individual “sticks.”⁸⁶ It is common in property law to have limitations in the property owner’s rights, but “no consensus exists regarding what is sufficient to constitute the minimal bundle of rights necessary for ‘property.’”⁸⁷ In other words, if an owner is narrowly limited in her use of some of the individual rights, does she really have any property right in the object? At this point, there appears to be no clear answer. But when there is a question of limitation or expansion of the property rights, the courts determine the acceptable latitude of rights.⁸⁸ Yet even the courts are undecided when examining property interests in human cells: “Few courts have adjudicated the scope of property interests in human cells, and those that have examined the issue are divided sharply.”⁸⁹

⁸⁰ *Id.* at 6.

⁸¹ *Id.*

⁸² *Id.* at 7.

⁸³ Bergelson, *supra* note 79, 429–30.

⁸⁴ Phillip Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 224–25 (1996).

⁸⁵ *Id.*

⁸⁶ *Id.* at 225.

⁸⁷ *Id.* at 224–25.

⁸⁸ See e.g., *York v. Jones*, 717 F.Supp. 421, 423–24 (E.D. Va. 1989); *Moore v. Regents of University of Cal.*, 793 P.2d 479, 480–81 (Cal. 1990); *Hecht v. Superior Court*, 16 Cal. App. 4th 836, 839 (1993).

⁸⁹ Jennifer Long Collins, *Hecht v. Superior Court: Recognizing a Property Right in Reproductive Material*, 33. U. LOUISVILLE J. FAM. L. 661, 663 n.17 (1995).

B. *Attempted Claim to Property Rights*

One court that has addressed those property interests is the California Supreme Court; in *Moore v. Regents University of California*, the court had to determine if property rights existed in tissue and cells, and if so, how limited were those rights.⁹⁰ *Moore* was the first case to decide that individuals do not have a property interest in their excised cells.⁹¹ The plaintiff, John Moore, had been diagnosed with a form of leukemia and consulted the defendant, Dr. Golde, who confirmed the diagnosis.⁹² To slow Moore's disease, Dr. Golde recommended that Moore have his spleen removed, and Moore consented.⁹³ However, Moore was unaware of Dr. Golde's preexisting research at the time he consented, and was further unaware that there was potential for financial gain resulting from the use of the tissues.⁹⁴ The tissues from Moore's spleen and vials of blood taken during procedures eventually allowed Dr. Golde to create a cell line, which was later patented.⁹⁵ Moore brought suit against Dr. Golde for breach of fiduciary duty, claiming Dr. Golde's failure to disclose material information resulted in an invalid informed consent.⁹⁶ Moore also claimed a conversion of his cells.⁹⁷ The issue most relevant to property rights in excised tissue and cells, and therefore to this Article, is the alleged conversion of the cells.

The majority opinion very briefly discussed the idea of property rights in the cells, but quickly disposed of the idea because of existing disposal regulations for tissue, cells, and blood:

[R]esearch [does not] disclose[] a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis [unique or different than the normal], regulating their disposition to achieve policy goals rather than

⁹⁰ *Moore*, 793 P.2d at 487.

⁹¹ *Id.* at 492.

⁹² *Id.* at 480–81.

⁹³ *Id.* at 481.

⁹⁴ *Id.* at 480.

⁹⁵ *Id.* at 481–82.

⁹⁶ *Id.* at 482–83.

⁹⁷ *Id.* at 482–83.

abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.⁹⁸

However, some argue that *Moore* incorrectly disregarded the property interest in excised tissue, cells, and blood.⁹⁹ Even though there are standards to regulate the handling of the material, such standards do not negate an interest in the material.¹⁰⁰ It is illogical to say that a person no longer retains rights over part of her body just because it has been excised.¹⁰¹ State statutes should not trump personal control over one's body parts.

Justice Mosk's dissent addressed the issue of property right in the excised tissue and cells. He emphasized that property laws are a broad and abstract application and that it is more appropriate to refer to the "bundle of sticks" the object possesses instead of referring directly to the object.¹⁰² Justice Mosk recognized that the "bundle of sticks" can be limited, but limitation does not disintegrate the property interest.¹⁰³ Applying this principle to Moore's tissue and cells, Justice Mosk explained:

Moore nevertheless retained valuable rights in that tissue. Above all, at the time of its excision he at least had *the right to do with his own tissue whatever the defendants did with it*: i.e., he could have contracted with researchers and

⁹⁸ *Id.* at 489 (footnotes omitted).

⁹⁹ Michelle Bourianoff Bray, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 238 (1990).

¹⁰⁰ Ducor, *supra* note 87, at 251.

¹⁰¹ When tissue, organs, and cells have yet to be excised, they are considered to be part of a person and not property. The public policy argument is if tissue, organs, and cells are classified as property while still inside of a person, the law would inevitably classify a person as a whole as property. Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 224–25 (1986). The court in *Moore* addressed several public policy interests that this property right would hinder. *Moore*, 793 P.2d at 493–94. This is a crime against human dignity, as there would be "control" over the body much like slavery. Once the tissue leaves the body the level of control changes. The person can either determine whether a medical entity or physician can use the tissue or cells for research or just allow disposal of them, but nothing more. *Id.* at 491–92.

¹⁰² *Moore*, 793 P.2d at 509 (Mosk, J., dissenting).

¹⁰³ *Id.* at 510.

pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products.¹⁰⁴

Justice Mosk rebutted the majority's argument that no other case has granted property rights in a person's excised cells.¹⁰⁵ He also observed that no cases have stated a person cannot obtain a property right in one's own body parts.¹⁰⁶ This provides an excellent reminder that *Moore* is not an authoritative source, except in California. While *Moore* is still persuasive, it is not the final word on whether property rights exist in excised cells.

C. *Property Rights of Genetic Material*

As stated, courts have been inconsistent in recognizing property rights in tissue and cells. Before *Moore* was decided, the Eastern District Court of Virginia granted quasi-property rights in an embryo.¹⁰⁷ After *Moore*, the Second District Court of Appeals in California also granted quasi-property rights in sperm.¹⁰⁸

In *York v. Jones*, a husband and wife brought a claim against an in-vitro fertility clinic where they were receiving treatment seeking the release of an embryo to be transported to another facility.¹⁰⁹ Since a contract was made between the facility and the couple, the court relied on the contract to find a bailor-bailee relationship.¹¹⁰ When a bailment relationship is created, there is an absolute obligation to return the property upon cessation of the relationship.¹¹¹ The court referenced the contract language characterizing the embryo as being property of the couple, but ultimately decided the case based on the bailment relationship and did not further discuss the property rights in the embryo.¹¹²

A similar case outcome occurred in California, this time in reference to sperm.¹¹³ Deborah Hecht filed a preemptory writ of mandate to stay a California Trial Court's Order to destroy 15 vials of sperm granted to her in

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 507.

¹⁰⁶ *Id.*

¹⁰⁷ *York v. Jones*, 717 F.Supp. 421, 423–24 (E.D. Va. 1989).

¹⁰⁸ *Hecht v. Superior Court*, 16 Cal. App. 4th 836, 839 (1993).

¹⁰⁹ *York*, 717 F.Supp. at 423–24.

¹¹⁰ *Id.* at 425.

¹¹¹ *Id.*

¹¹² *Id.* at 426–27.

¹¹³ *Hecht*, 16 Cal. App. 4th at 839.

her boyfriend's will.¹¹⁴ William Kane had willed the vials to Hecht in hopes that she would still have his child after his death.¹¹⁵ Kane's adult children entered the suit as interested parties to prevent the birth of a child that would never know their father and to prevent the disruption the unborn child would have caused in the existing families' lives.¹¹⁶ The children urged the appellate court to uphold the trial court's order based on *Moore*; if the sperm were not considered property, then it would not be distributable under the probate code.¹¹⁷ The court rejected this argument and determined that, if property rights do not govern the semen, it deserved a special category due to the potential of human life, and the court classified the sperm to be "sufficient to constitute 'property' within the meaning" of the probate code.¹¹⁸

The court also stated that the "decendent had an interest, in the nature of the ownership, to the extent that he had decision making authority to the sperm within the scope of policy set by the law."¹¹⁹ The court used *York* and *The American Fertility Society* as guidance to articulate that donors have the right to decide the disposition of gamete material.¹²⁰ It also discussed *Davis v. Davis*, which allowed a quasi-property interest in the ownership of a preembryo because it was due "greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people."¹²¹ The *Hecht* court then declined to direct the trial court to distribute the sperm to Hecht because of unresolved matters.¹²² On remand, the trial court eventually gave Hecht 20% of the sperm, based on a secondary agreement of the contested will.¹²³ Thus, it appears courts are

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 840.

¹¹⁶ *Id.* at 844.

¹¹⁷ *Id.* at 846.

¹¹⁸ *Id.* at 850. The applicable California probate code classifies property as "anything that may be the subject of ownership and includes both real and personal property and any interest therein." CA. PROB. CODE § 62 (West 2016).

¹¹⁹ *Hecht*, 16 Cal. App. 4th, at 846.

¹²⁰ *Id.* at 848. Gamete material referenced is the existence of an egg or sperm.

¹²¹ *Id.* at 849–50.

¹²² *Id.* at 852.

¹²³ *Kane v. Superior Court*, 37 Cal. App. 4th 1577, 1580–81 (1995) ("The balance of all assets over which the decedent had dominion or control or ownership, whether in the possession of Miss. Hecht, the children or any third party shall be subject to administration in the decedent's estate.' The formula in the settlement agreement for distribution of assets provided '... [s]ums in excess of \$190,000 net available for distribution will be distributed 20% to Deborah Hecht, 40% to Katherine E. Kane and 40% to Everett.'").

willing to explore the claim that tissue and cells outside of the body have the potential for possessing property rights, especially when it is evident the person intended to extend the rights to the tissue and cells.

III. FEDERAL REGULATIONS, STATE STATUTES, AND HOSPITAL REGULATIONS ON GIVING PATIENTS THEIR EXCISED TISSUE

Due to the regulations already enacted by federal and state statutes, some courts are willing to quickly dispose of rights to the tissue. Others have determined that the regulations are not enough to determine the possible rights involved.

Assorted laws, ranging from federal statutes to state health organization regulations, govern the placenta.¹²⁴ With the potential risk of spreading disease, many of these regulations were made to protect the public.¹²⁵ A few states, while recognizing the potential hazard for spreading disease, have found a way to mitigate the risk while conceding a woman's interest in obtaining her placenta.¹²⁶ These states have enacted statutes allowing a woman to remove the placenta from hospital grounds without a court order.¹²⁷ Laws that oversee the handling and disposition of the placenta will be further discussed throughout the section.

A. *Federal Regulations*

The Occupational Safety and Health Administration (OSHA), a federal agency, controls the handling of waste that is considered "regulated waste."¹²⁸ OSHA defines "regulated waste" as any waste that has the potential to leak, is caked in, or is liquid blood, semi-liquid blood, or other

¹²⁴ 29 C.F.R. § 1910.1030 (2012); HAW. CODE R. § 11-104.1-34 (West 2016); OR. ADMIN. R. 333-056-0045 (2016); Tex. Health and Safety Code Ann. § 172.002 (West 2015).

¹²⁵ These statutes address the spread of various infectious diseases as the main purpose for screening the woman's placenta. *See generally* 29 C.F.R. § 1910.1030; HAW. CODE R. § 11-104.1-34; OR. ADMIN. R. 333-056-0045; Tex. Health and Safety Code Ann. § 172.002.

¹²⁶ HAW. CODE R. § 11-104.1-34; OR. ADMIN. R. 333-056-0045; Tex. Health and Safety Code Ann. § 172.002.

¹²⁷ HAW. CODE R. § 11-104.1-34; OR. ADMIN. R. 333-056-0045; Tex. Health and Safety Code Ann. § 172.002.

¹²⁸ OSHA's main purpose is to regulate Occupational Health and Safety Standards. 29 C.F.R. § 1910.1030(b).

potentially infectious materials.¹²⁹ As the placenta has the characteristics of being bloody, OSHA would govern handling procedures.

For a facility that handles this type of material, the regulations provide specifications on the environment and “personal protective equipment” an employer must provide to the employee, direction on how the employee is supposed to package the waste, and procedures on what an employee should do if he or she were to come in contact with this type of material.¹³⁰ OSHA requires these procedures to protect employees from specific infectious diseases—hepatitis B and HIV.¹³¹ However, when it comes to specificity on disposal of the material, OSHA refers back to federal and state statutes.¹³² Interestingly enough, there are no federal regulations that cover the disposal of medical waste.¹³³ The rational idea is that the Environmental Protection Agency would be the entity to create regulations on the disposal of medical waste, but that is not the case. This leaves the states to adopt their own regulations.

B. *State Statutes: Texas, Oregon, and Hawaii Medical Waste Exceptions Statutes*

Texas, Oregon, and Hawaii have already recognized a woman’s interest in her placenta.¹³⁴ Each state has created statutory requirements, which, once met, allow a woman to take her placenta home. While these states agree that a woman should have access to her placenta, statutes vary between the states.

Texas’ statute only requires a woman to meet a few statutory

¹²⁹ 29 C.F.R. § 1910.1030(b) (“Regulated Waste means liquid or semi-liquid blood or other potentially infectious materials; contaminated items that would release blood or other potentially infectious materials in a liquid or semi-liquid state if compressed; items that are caked with dried blood or other potentially infectious materials and are capable of releasing these materials during handling; contaminated sharps; and pathological and microbiological wastes containing blood or other potentially infectious materials.”).

¹³⁰ *Id.*

¹³¹ *Id.* (defining bloodborne pathogens to include HIV and hepatitis B (HBV)).

¹³² *Id.* at §1910.1030(d)(4)(iii)(C).

¹³³ National Institute for Occupational Safety and Health, *Self-Inspection Checklist*, CDC (June 6, 2014), <http://www.cdc.gov/niosh/docs/2004-101/chklists/r1n79m~1.htm>.

¹³⁴ Maryland has a state statute that implies there might be a possibility for the parents to obtain the placenta: it excludes under the chapter of disposal regulations (applicable to persons who treat and dispose of medical waste) “fetuses and placentas that are released to a funeral director or a parent.” MD. CODE REGS. 10.06.06.01 (2016).

provisions.¹³⁵ A woman must test negative for certain diseases, specifically syphilis, HIV, and hepatitis B,¹³⁶ and acknowledge the placenta is only for personal use.¹³⁷ Next, a woman may not interfere with a physician's request to test the placenta through examination by pathology.¹³⁸ The hospital has an obligation to obtain an acknowledgment form from the woman and note it in her chart.¹³⁹ The form must indicate that the woman has received material about the proper care of the placenta, the risks of spreading blood-borne pathogens, and the risk of ingesting formalin.¹⁴⁰

While Texas provides less stringent standards than the other states, it accounts for protection of liability against the hospital and doctors. The physician-ordered placenta examination requirement exemplifies this.¹⁴¹ It allows a pediatrician to have a closer look at the placenta to confirm there is no damage that could affect the newborn, thus allowing the doctor to elude a potential malpractice suit.¹⁴² Another form of liability protection in the statute provides that a hospital is not liable for a civil action, criminal procedure, or administrative proceeding when operating under the section.¹⁴³ These portions of the statute do not appear in Oregon or Hawaii.¹⁴⁴ It is apparent that Texas saw the possible repercussions of giving full access to a placenta without providing safety nets for the persons and entities involved.

Oregon's statutory regulation appears to closely follow OSHA's infectious waste guidelines. It provides health care facilities and freestanding birthing centers the ability to enable a woman or designee to take her placenta home, provided that the facilities have a policy and procedure to ensure the safe management and transport of placentas.¹⁴⁵ The facility must also possess records that the woman has tested negative for hepatitis B and HIV since the beginning of the pregnancy, that she is free from hepatitis C or not at risk for

¹³⁵ Tex. Health and Safety Code Ann. § 172.002.

¹³⁶ *Id.* at § 81.090.

¹³⁷ *Id.* at § 172.002.

¹³⁸ *Id.* at § 81.090(a)(1).

¹³⁹ *Id.* at § 172.002(a)(2).

¹⁴⁰ *Id.* at § 172.002(a)(2)(A).

¹⁴¹ *Id.* at § 172.002.

¹⁴² *Id.* at § 81.090(a-1).

¹⁴³ *Id.* at § 172.002(f).

¹⁴⁴ See HAW. CODE R. § 11-104.1-34; OR. ADMIN. R. 333-056-0045.

¹⁴⁵ OR. ADMIN. R. 333-056-0045.

it, and that she is free from any other infectious diseases.¹⁴⁶ The woman must sign a form containing personal health information and agreeing that her placenta will not be used for commercial purposes.¹⁴⁷ Finally, the woman must acknowledge that she is free from any diseases that may threaten those who handle the placenta.¹⁴⁸ The medical center must keep a copy of the form in the mother's medical record.¹⁴⁹ The statute also gives authority to health care facilities to provide additional requirements for the removal of the placenta.¹⁵⁰

Hawaii's statute requires similar testing to the Oregon statute.¹⁵¹ The health care facility is required to have a procedure developed for safe management and transport of the placenta following the OSHA guidelines.¹⁵² A "release form must be signed by the mother, physician, and health care facility authority," and a copy of the release form must be put in the patient's chart while another copy is sent to the department.¹⁵³

C. *Hospital Regulations*

Hospitals are regulated by multiple federal agencies: the Center for Medicare and Medicaid Services (CMS), Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC), and OSHA, to name a few. OSHA's regulations have a direct impact on the placenta and how a hospital is required to handle the material.¹⁵⁴ Due to the multiple players providing oversight, hospitals are beginning to see a need to revise procedures regarding the handling of human tissue.¹⁵⁵ Doctors are promising certain actions to patients, sometimes in contravention of hospital policy, or alternatively, the hospital may be unaware of the commitments made by

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 333-056-0045 (1)(c)(B).

¹⁴⁸ *Id.* at 333-056-0045 (1)(c)(C)(i).

¹⁴⁹ *Id.* at 333-056-0045 (2).

¹⁵⁰ *Id.* at 333-056-0045 (4).

¹⁵¹ HAW. CODE R. § 11-104.1-34(a).

¹⁵² *Id.* § 11-104.1-34(b).

¹⁵³ *Id.* § 11-104.1-34(d).

¹⁵⁴ 29 C.F.R. § 1910.1030(b).

¹⁵⁵ Stacey Meadows & Doreen Kornrumpf, *Wrestling Over Human Tissue: Yours, Mine or Ours?* 00:03:30, ARCHIVE.HEALTHLAWYERS.ORG, http://archive.healthlawyers.org/google/h_ealth_law_archive/program_papers/2/2011_BIOMED/biomed_C.mp3 (last visited Feb. 17, 2018).

doctors and therefore unable to inform the patient otherwise.¹⁵⁶ Hospitals' general counsel do not think that it is appropriate to give tissue directly to patients due to preservation issues and infection risks.¹⁵⁷

There are certain procedures that a hospital must follow that affect the release of the placenta. Again, OSHA regulations would apply to the handling of the placenta.¹⁵⁸ This might include sterilization, since the placenta falls into OSHA's "regulated waste" category.¹⁵⁹ A hospital also might send the placenta to pathology for inspection of any damage to the placenta.¹⁶⁰ This allows the peditatrician to determine whether to provide medical care to a child who might not be exhibiting signs of damage.

Overall, there is general regulation of the placenta because it is lumped together with other tissue and cells. However, the placenta is more than simply another tissue or cell that was excised from the body. Its excision was not due to illness or surgery, but due to birth. It is apparent that a property right needs to exist in the placenta so women can no longer be denied an interest they possess. The next section proposes a few different solutions in granting the rights a woman rightfully deserves in her placenta.

IV. SOLUTION

The ideal and most suitable solution to the problems discussed above would be to grant property rights in the placenta to the woman. Through the application of property rights, it is obvious that the right also comes with consequences. That is why this Article recommends a carve out in OSHA regulations. While giving women full access, it also protects the public and those who are a part of the process. This section discusses the solution in providing for property rights, as well as the consequences that might emerge.

A. *Justification of Property Rights in Placentas*

Through the application of property categories to the placenta, this Article will rebut *Moore's* holding and other case precedent and will show substantial evidence that property rights should be allowed to vest in the placenta. As stated above, acknowledging full property rights in the placenta also comes with potential societal risks. To properly manage the risks there

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 00:52:00.

¹⁵⁸ *See supra* note 130.

¹⁵⁹ *See supra* note 130.

¹⁶⁰ Baergen, *supra* note 6, at 328.

should be certain limitations or requirements on the possession of the placenta through federal regulation or state statutes.

1. Application of property categories. Property rights are a human invention created through the justification of ownership in an object.¹⁶¹ A woman's property rights in her excised placenta can be justified through the application of four of the five theories that give rise to property law: first possessor, labor/desert principle, utilitarianism, and personhood.¹⁶² Usually identified as the most important justification, the first possessor theory lays the foundation that property rights should vest in the placenta.¹⁶³

A woman is the first possessor of the placenta. She has made a conscious decision to become pregnant or continue her pregnancy and grow a placenta to provide life support to the baby. When a woman decides to partake in placentophagy, she extends her interest in possession when she informs her physician or midwife of her desire to take possession of the placenta once it has been birthed. Based on the first and most basic property law, a first possessor of an object is the property right holder; therefore, the woman should possess the rights in her placenta.

The labor/desert principle is applicable because the woman's body labors to grow the placenta until the baby is born. A woman's body transforms through the pregnancy and provides nutrients, hormones, and oxygen through the placenta to the baby. Again, when a woman decides and knows that she is going to have a baby, she does not idly sit by as the placenta grows, but she must actively participate in its growth. She is the reason for its growth. Through this process, she has invested her own labor in growing the placenta and birthing it after a baby.

Placentophagy embodies the utilitarian theory, for the basis of the practice is the benefit to the wellbeing of the mother and child. Allowing property rights to vest in the placenta would maximize human satisfaction. If placentophagy were legalized, many women would not be reeling from the side effects of postpartum depression, nor would they have to endure a potentially drawn out process in trying to gain access to their placentas in the current system.

Finally, by obtaining the placenta, it promotes a woman and child's individual development, personifying the personhood category. One of the

¹⁶¹ SPRANKLING & COLETTA, *supra* note 74, at 2–8.

¹⁶² *Id.*

¹⁶³ Friedman & Neary, *supra* note 76.

main reasons a woman seeks to obtain her placenta is to participate in placentophagy in order to prevent suffering through postpartum depression. The suffering can greatly diminish a woman's mental state and wellbeing. Through an individual choice to partake in placentophagy, the woman would be able to achieve self-development. Also, many families use the placenta for other rituals that are a part of their culture, which directly connects with personhood. If an attempt to gain the placenta in the modern system proved unsuccessful, it could negatively affect a woman's wellbeing and her and her family's cultural practices. Such negative effects directly affect the woman's personhood.

Considering the benefits of partaking in placentophagy and the application of the four property law justifications, there is enough evidence to prove that a property interest in the placenta would be beneficial to society. That benefit should provide enough justification to allow the woman to hold the "bundle of sticks" to placenta rights. Although some might argue that *Moore's* holding could or should be applied to invalidate the justifications discussed above, it should not be applied to the placenta, for reasons discussed in the next section.

2. *Invalidity of the Moore holding.* Moore was incorrectly decided and its holding should not apply to the placenta. In Moore, the court's largest issue was the tort claim of conversion, due to the potential creation of personal fiduciary gain through a property interest in the excised tissue and cells.¹⁶⁴ That issue is inapplicable to placentas: women are seeking to consume or dispose of their placentas according to cultural practices, and are not seeking to obtain monetary gain by selling them.¹⁶⁵ The tissue in Moore also differs from the placenta because placentas are

¹⁶⁴ *Moore v. Regents of University of Cal.*, 793 P.2d 479, 491–92 (Cal. 1990).

¹⁶⁵ The argument could be made that the woman could sell it and not violate the Uniform Anatomical Gift Act that prohibits the selling of organs, due to the lack of transplantation and the placenta's regenerative nature, similar to blood and fecal matter. *Id.* at 505 n.5. Blood and fecal matter are sold throughout the United States and are deemed acceptable. Sophia Chase, *The Bloody Truth: Examining America's Blood Industry and its Tort Liability Through the Arkansas Prison Plasma Scandal*, 3 WM. & MARY BUS. L. REV. 597, 602 (2012); Rachel Feltman, *You Can Earn \$13,000 a Year Selling Your Poop*, WASH. POST (Jan. 29, 2015) https://www.washingtonpost.com/news/speaking-of-science/wp/2015/01/29/you-can-earn-13000-a-year-selling-your-poop/?utm_term=.a38d52ba04f7. The other important aspect of the argument is that the monetary benefit would have to be low enough not to entice people to get pregnant for the purpose of selling the placenta. *Moore*, 793 P.2d at 505 n.5.

excised through the birth of a child, not through surgery due to illness or research purposes.

However, because of *Moore*'s quick disposition of property rights in excised cells, obtaining the placenta for personal use has proven difficult. *Moore*'s disposition disregarded the potential for a personal use interest in obtaining property rights, and now allows California, and any state following that precedent, to regulate these rights.¹⁶⁶ But a disposition regulation should not so quickly stop the court from addressing the possibility of property rights without applying property justifications. A property interest can be greater than the policy reasons behind disposition regulations, especially when those policy reasons do not apply to the interest.

The *Moore* court also contended that, by allowing a conversion issue to prevail, it would be admitting there is a property interest to vest in a person's cells and tissues.¹⁶⁷ By allowing this interest, the court believed patients would inundate the judicial system with conversion tort suits against the physicians and entities that make a profit on these cells.¹⁶⁸ This in turn might have a devastating effect on medical research, creating great harm to the common good.¹⁶⁹ Yet this is not the case.

It can be assumed that most laypersons probably perceive they have an "interest" in their cells, which would still exist once the cells leave their body. In addition, the hospital already has the duty to disclose a fiduciary gain, and if an individual felt unenthusiastic about the idea of a hospital, university, or physician making large monetary gains from the patient's cells or tissue, the patient would simply say no to the research. The court's argument lacks support, as research is still alive and well, and other numerous patents have been created off other patients' cell lines. It can also be assumed the cells and tissues were obtained through valid informed consent and disclosure of fiduciary gain. The court's assumption was wrong.

Justice Broussard made a similar argument in his concurring and dissenting opinion in *Moore*.¹⁷⁰ If patients were compensated for their cells, they might be more inclined to consent to research treatment or participation,

¹⁶⁶ *Id.* at 493.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 491–92.

¹⁶⁹ *Id.* at 488.

¹⁷⁰ *Id.* at 498–506. (Broussard, J., dissenting).

instead of being resentful of the physician or entity's fiduciary gains from the patient's own cells.¹⁷¹ That in turn would provide even more opportunities for physicians and hospitals to further their research.

Allowing property rights to vest in a woman's placenta would not cause the demise of medical research. It would merely allow a personal use that should be granted to the woman if courts correctly applied the justifications for property laws. As Justice Mosk stated in his dissent, "[s]ince property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or a great many of these elements does not entirely destroy the title."¹⁷²

As Justice Mosk implied, limiting the bundle of sticks does not require the property right as a whole to be destroyed.¹⁷³ The court's articulation of the disposition policy reasons in *Moore* is correct, but courts need not destroy all the rights, just merely limit them. The same can be said with the placenta. The handling and disposition regulations are important to the use of the placenta. These regulations, however, should not disregard a woman's interest to obtain her placenta for personal use. *Moore*'s holding has made it considerably more difficult, but not completely impossible, to obtain property rights in excised cells and tissues. Multiple courts have found means to grant quasi-property rights, which will be discussed in the next section.

3. *Application of other case precedent.* *Hecht* and *York* prove courts are willing to grant quasi-property rights in sperm¹⁷⁴ and embryos.¹⁷⁵ The courts did not grant these rights because they determined the individuals possessed the rights in the sperm and embryo, but rather they depended on contract law to justify the rights bailment relationships.¹⁷⁶ Also, since the material in *Hecht* contained gametes, that court considered it significant in the creation of life.¹⁷⁷ This made the courts reluctant to make a distinguishing remark about the ownership of the material, but used it as a point to grant the

¹⁷¹ *Id.* at 504.

¹⁷² *Id.* at 510 (Mosk, J., dissenting) (quoting *People v. Walker* 90 P.2d 854, 855 (1939)).

¹⁷³ *Id.*

¹⁷⁴ *Hecht v. Superior Court*, 16 Cal. App. 4th 836 (1993).

¹⁷⁵ *York v. Jones*, 717 F.Supp. 421 (E.D. Va. 1989).

¹⁷⁶ A bailment relationship is "[a] delivery of personal property by one person (*the bailor*) to another (*the bailee*) who holds property for a certain purpose, usu. Under an express or implied-in-fact contract. Unlike a sale or gift of personal property, a bailment involves a change in possession but not in title." *Bailment*, BLACK'S LAW DICTIONARY 169 (10th ed. 2014).

¹⁷⁷ *Hecht*, 16 Cal. App. 4th at 848.

quasi-rights.¹⁷⁸ The courts are achieving the correct result, but the method is skirting the true issue of people's property rights in reproductive material, which in turn affects possessory rights of a placenta.

Courts should continue to hold that a person has a property interest in reproduction-related excised tissue and cells and should include the placenta in this category by using *Hecht* and *York* as precedent. Even though the placenta would not usually be covered under contract law through a bailment relationship, the placenta is like the sperm and embryo, as it is composed of parts of the mother's immunity and cell structure. It is genetically and immunologically the same as the fetus, it is embryonic in nature, and it is vital to fetus life.¹⁷⁹ This comparison is important, as the court in *Hecht* discussed the composition of material and its potential to human life.¹⁸⁰ Also important to the *Hecht* court was *Davis*'s holding granting quasi-property rights in the preembryo because of its "symbolic meaning to many people."¹⁸¹ This resembles the attitudes many cultures and women have towards the placenta.

Although courts might not be convinced of the similarities that an embryo, sperm, and placenta possess, the placenta is distinguishable from other tissues, cells, and blood and should be considered a part of the reproductive material that has already obtained quasi-property rights. The placenta is considered a major endocrine organ, vital to fetal life.¹⁸² Through this application, the placenta can be classified as reproductive material, allowing the *Hecht* and *York* precedents to apply. By also applying the category property justifications, courts could extend quasi-property right to allow the woman to possess the majority of the control over the placenta.

It is apparent there is a societal benefit of placentophagy, but it cannot be denied there is also a societal risk of unfettered access to the placenta. By limiting the rights through federal regulations and state statutes, society's possible exposure risk to infectious material is reduced. The suggested limitations on placental property rights are detailed in the following section.

¹⁷⁸ *York*, 717 F. Supp. at 421.

¹⁷⁹ Munzer, *supra* note 77, at 499.

¹⁸⁰ *Hecht*, 16 Cal. App. 4th at 850.

¹⁸¹ *Id.* at 849–50.

¹⁸² Rindler, *supra* note 52.

B. *Federal Regulations and State Statutes*

A carve out in federal regulations and/or an enactment of state statutes for the placenta should be created to protect society from the risks surrounding careless handling of placentas. The carve out would specifically apply to the “regulated waste” section of OSHA. The main purpose of the OSHA regulation is to limit the exposure to infectious waste. To preserve the policy reason of the regulation and cultivate women’s property rights in the placenta, the carve out would limit the property rights, but not invalidate those rights entirely.¹⁸³ While the three previously-mentioned states allow women to take their placentas, the statutes vary on the prior requirements needed for relinquishment.¹⁸⁴ These variances result in inconsistencies. A carve out would limit inconsistencies and provide protection by requiring a blood test. If a state or entity did not require blood tests before relinquishment, infectious material could have the possibility of crossing state lines and increasing exposure to health risks. The employees of facilities that handle placentas and the public should be guarded against the possibility of an infection. Additionally, the carve out would provide proper guidance on how to implement procedures to reduce exposure while preserving the integrity of the placenta and its nutritional benefits.

The carve out should provide an exemption to hospitals or birthing centers from using sterilization or incineration processes on placentas, if they are requested for personal use. Sterilization has an unknown effect on the nutrient value of the placenta and some women choose not to sterilize it during the preparation process.¹⁸⁵ The exemption would be reliant on blood testing for HIV and hepatitis B diseases. If the patient’s blood test comes back negative, the placenta would not be considered infectious waste and could be relinquished. Fortunately, all of the enacted state statutes have blood tests as a part of their regulations.¹⁸⁶ A state seeking to implement its own statutory allowance of a claim to a placenta should use a combination of the existing

¹⁸³ Upholding the policy reasons of OSHA is distinguishable from the majority holding in *Moore*, because even with the limitation in the bundle of sticks, it still grants a property right in the placenta.

¹⁸⁴ See generally HAW. CODE R. § 11-104.1-34; OR. ADMIN. R. 333-056-0045; Tex. Health and Safety Code Ann. § 172.002.

¹⁸⁵ Marraccini & Gorman, *supra* note 45.

¹⁸⁶ HAW. CODE R. § 11-104.1-34(b); OR. ADMIN. R. 333-056-0045(1)(b); Tex. Health and Safety Code Ann. § 81.090(a)(1).

statutes for the most unfettered access to the placenta while providing liability protection to the involved entities.

Texas provides the best example of this type of statute.¹⁸⁷ It requires blood testing of the two diseases OSHA is most concerned about—hepatitis B and HIV—as well as syphilis.¹⁸⁸ Oregon adds the additional testing for hepatitis C, and includes room for whatever the state may later become concerned about.¹⁸⁹ Hawaii is very general about the test performed, requiring it only to be negative for infection or hazard, but does not explicitly state what the infection or hazard may be.¹⁹⁰

Texas is the only state to specify that the placenta need not be disposed of as medical waste, unburdening the woman if there is unused placenta.¹⁹¹ Another important aspect of Texas' statute is the protection it provides the hospitals or birthing centers, by specifying that hospitals and birthing centers cannot be liable under civil action, criminal proceedings, or administrative proceedings regarding placental release.¹⁹² One way the state mitigates the liability is by requiring a portion of placenta to be submitted for examination by pathology.¹⁹³ As stated above, this examination allows the pediatrician to determine if the placenta sustained damage and in turn affected the baby, which could be mitigated through pediatric care.¹⁹⁴

A piece lacking in Texas' statute is requirements upon the health care facility to implement safe handling and transportation procedures. Oregon and Hawaii possess this requirement in their statutes.¹⁹⁵ A limitation that the Texas and Oregon statutes impose is on the selling of the placenta.¹⁹⁶ Acknowledgment of these requirements and procedures are documented in the patient's chart, along with a signed form provided by the hospital.¹⁹⁷ An important aspect of the form is patient acknowledgement that she has

¹⁸⁷ Tex. Health and Safety Code Ann. § 81.090(a)(1).

¹⁸⁸ *Id.* § 81.090(a)(2).

¹⁸⁹ OR. ADMIN. R. 333-056-0045 (2016)(1)(b).

¹⁹⁰ HAW. CODE R. § 11-104.1-34(b).

¹⁹¹ Tex. Health and Safety Code Ann. § 172.002(f).

¹⁹² *Id.* at § 172.002(g).

¹⁹³ *Id.* at § 172.002(a).

¹⁹⁴ *Supra* note 143 and accompanying text.

¹⁹⁵ HAW. CODE R. § 11-104.1-34(b); OR. ADMIN. R. 333-056-0045(1)(a).

¹⁹⁶ OR. ADMIN. R. 333-056-0045(1)(c)(B); Tex. Health and Safety Code Ann. § 172.002(a)(2)(B).

¹⁹⁷ OR. ADMIN. R. 333-056-0045(1)(c); Tex. Health and Safety Code Ann. § 172.002(a)(2).

received information about handling the placenta and its consumption.¹⁹⁸ By using Texas' statute as a foundation and including the referenced portions from Oregon and Hawaii, a newly drafted statute could give a woman access to her placenta and provide protection to the entities involved. The OSHA regulation or state statute changes would affect how hospitals handle the process of relinquishment of the placenta.

C. *Modification of Hospital Regulations*

Along with the proposed carve out in OSHA and possible state statutes, the HHS and CMS should provide guidance to the hospitals regarding the new regulations. Standardized guidance through HHS or CMS on proper handling of the placenta could provide a more systematic approach across the medical field. The guidance should address a variety of issues on the release of the placenta, which hospitals may have been dealing with over the years. With published guidance from these agencies, a physician might be more likely to be aware of and abide by the regulations. It would also help prevent the hospital from taking on a liability it is not aware of and would keep the hospital within OSHA compliance for the handling of infectious medical waste.

In applying the property category justifications, there is enough reason to justify a property interest in the placenta. An argument might be made that *Moore* makes these property rights invalid. However, the analysis of the decision and application of the concurrence and dissent's opinions provide a strong rebuttal that it would not apply to the placenta. Finally, after establishing property rights, it cannot be ignored that a societal interest exists in reducing the exposure to infectious diseases. This is reduced by creating a carve out in OSHA regulations or enacting state statutes.

CONCLUSION

Through the ages, the placenta has been used for many cultural practices, including placentophagy. With an interest in the medicinal benefits of placentophagy, there is a renewed interest in the practice, which has increased the requests for the placenta after birth. This has created an inconsistency in hospital procedures, either requiring women to obtain court

¹⁹⁸ OR. ADMIN. R. 333-056-0045(1)(c); Tex. Health and Safety Code Ann. § 172.002(a)(2)(A).

orders to receive their placentas or forcing a physician to choose to bypass hospital regulations and give it directly to the patient.

By allowing a property interest to attach to the placenta, the woman would have the freedom to exercise that right, if she determines she would like to partake in placentophagy for the betterment of her and her family. The courts could create property rights in the placenta through two ways: either by applying four of the five property categories to justify a property interest, or by using precedential reproductive cases to show that the placenta still holds the same qualities the courts have referenced in providing quasi-property rights in sperm and embryos.

Even though a defined property right would exist, the bundle of sticks should still be limited, due to societal risk of potential infectious diseases in the placenta. These risks can be managed through federal regulations and state statutes. Through the provided avenues, it would allow women to enjoy their right in the placenta and fully partake in placentophagy without undue legal hardship.